Eastern Enterprises v. Apfel: How *Lochner* Got It Right*

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In Eastern Enterprises v. Apfel, *the Supreme Court considered the validity of the Coal Act, a federal statute enforcing retroactive liability for coal miners' pension funds, as applied against a corporation that had long ago stopped its mining operations. Eschewing substantive due process as a means of enforcing an unenumerated economic right to be free from retroactive legislation, the Court instead declared that this application of the Coal Act was an unconstitutional taking under the Fifth Amendment. This Comment argues that the Supreme Court's use of the regulatory takings doctrine in this context is an illogical expansion of the Takings Clause. The author argues, further, that the use of the Takings Clause in* Eastern Enterprises *to enforce an unenumerated economic right has the potential to create a legal regime that is no better (and which may be worse) than that created by* Lochner v. New York. *As a result, the author concludes, if unenumerated economic rights must be enforced, the Due Process Clauses of the Fifth and Fourteenth Amendments, properly constrained, are a more appropriate vehicle than the Takings Clause as construed in* Eastern Enterprises.

[H]e that breaks a thing to find out what it is has left the path of wisdom.

– J.R.R. Tolkien[1]

I. INTRODUCTION

The ancients pictured fate as a weaver's wheel, spinning out the lives of men and beasts like threads in the pattern of time. Perhaps without knowing what they were doing, they hit upon a perfect metaphor, for it stresses the cyclical nature of human experience.[2] History repeats itself with an alarming amount of regularity,

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[1] J.R.R. TOLKIEN, THE FELLOWSHIP OF THE RING 272 (1954).

[2] At least the image has remained an enduring one. *See, e.g.*, ROBERT JORDAN, THE SHADOW RISING 13 (1992) ("The Wheel of Time turns, and Ages come and pass, leaving memories that become legend. Legend fades to myth, and even myth is long forgotten when the Age that gave it birth comes again."); *see also* STEPHEN KING, THE WASTELANDS 315 (1991) (proclaiming that "death and treachery are . . . spokes on the wheel of [fate]"). The image is,

and any student of history can relate how the events of distant civilizations in ancient times mirror those of the modern world.[3] The wheel turns and ages come and go, but it always arrives back at the place where it started.

The wheel is, too, an apt metaphor for the Supreme Court's jurisprudence. Often, the Court rejects doctrines and theories, only to call them back from the dead without ceremony. Examples of this cyclical disavowal and reestablishment of doctrines fill the casebooks.[4]

The jurisprudence of economic substantive due process is one such doctrine. The Court long ago abandoned the protection of unenumerated economic rights through the use of substantive due process; indeed, the saga of the cases which led to this abandonment are among the most notorious in the short history of the Constitution.[5] Over the course of the last century, and culminating in *Eastern Enterprises v. Apfel*,[6] decided last term, the Court has typically accomplished the

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too, a popular one in the canon of classical literature, stretching back to medieval mystery cycles and the works of Shakespeare, in which fortune was depicted as a woman holding a wheel; this may have been derived from the popular legend of the three Fates, who spun, measured, and cut the threads of life in ancient Greek and Norse mythology. *See generally* ARTHUR COTTERELL, THE ENCYCLOPEDIA OF MYTHOLOGY: CLASSICAL CELTIC NORSE (1996); ROBERT GRAVES, THE GREEK MYTHS (1988).

[3] For example, the Greens, the Reds, and the Blues, political parties of late Imperial Rome, fought each other in political battles that, while slightly less civilized than the partisan impeachment drama played out over the last year in Washington, are strikingly familiar. *See generally* HANS JULIUS WOLFF, ROMAN LAW (1951). In addition, one need only read an account of the lives of the emperors of Rome to realize that the shenanigans in Washington (sexual or otherwise) are not unique to our own age. *See generally* SUETONIUS TRANQUILLUS, THE TWELVE CAESARS (Robert Graves trans., Penguin 1957) (describing the lives of the first twelve Caesars of Rome in intimate—and sometimes offensive—detail).

[4] *See, e.g.*, Richard E. Levy, *Escaping* Lochner*'s Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329, 333–46 (1995). Professor Levy has noted two or three categories of such cases representing what he calls a process of "reinvigoration and retreat." All of the doctrines that he notes are related, fundamentally, to economic rights. First, he writes that the Court's Contracts Clause jurisprudence signaled a reinvigoration of economic rights in the late 1970s, but was cut short. *See id.* at 334–35. Second, he writes that structural doctrines like federalism and the separation of powers have undergone a similar cycle of rebirth and disavowal. *See id.* at 335–37.

Levy's concept of "reinvigoration and retreat" from economic rights differs substantively from the general pattern of disavowal and renewal mentioned in the opening paragraphs of this Comment. The former is technical and legal, envisioning the Court's decisions as an attempt to answer a specific legal problem; the latter encompasses the Court's jurisprudence as a response to specific historical and sociological stimuli. Although the two may overlap at times, they are for the most part distinct.

[5] *See generally* HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE (1998); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 474–94 (1997). *See also* discussion *infra* Parts II, III.

[6] 118 S. Ct. 2132 (1998).

protection of unenumerated economic rights by invoking the Takings Clause. It has presumably done so on the assumption that the Takings Clause is a more restrictive vehicle—and thus a more appropriate one—for unenumerated content, and so avoids the pitfalls inherent in the Court's earlier use of substantive due process.[7]

This Comment will question the veracity of this assumption by comparing the logical consequences of Takings Clause analysis after *Eastern Enterprises* with the substantive due process of the *Lochner*[8] era. It is divided into six Parts. Part II traces, very briefly, the development of the Court's jurisprudence of unenumerated economic rights.[9] Part III summarizes the opinion of the plurality in *Eastern Enterprises*.[10] Part IV addresses the potential interpretational difficulties created by *Eastern Enterprises*, demonstrating, ultimately, that the Takings Clause as pictured by the plurality is at least potentially incoherent.[11] Part V offers proof that, as a logical, legal, and practical matter, the Due Process Clause is better suited as a vehicle for unenumerated rights.[12] Without trying to be radical, it suggests that *Lochner*—or, at least, economic substantive due process—ought to be resurrected if the Takings Clause is the only other interpretational vehicle that the Court is willing to use. Part VI discusses several possible solutions to the problems that this comparative analysis reveals.[13] Finally, Part VII concludes the Comment by reiterating the general proposition that the doctrine of substantive due process provides a superior vehicle for unenumerated economic rights when compared to the regulatory takings doctrine, and thus should form the basis for a new theory of fundamental economic rights.[14] The ultimate goal of this Comment is to demonstrate that the Court's Takings Clause jurisprudence, if *Eastern Enterprises* is the new standard, is a far more dangerous and illogical place for unenumerated rights to reside than the Due Process Clause.[15]

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[7] Of particular importance for the Court in securing this protection was the doctrine of regulatory takings, discussed *infra* Part II.B.

[8] Lochner v. New York, 198 U.S. 45 (1905).

[9] *See infra* notes 16–50 and accompanying text.

[10] *See infra* notes 51–81 and accompanying text.

[11] *See infra* notes 82–115 and accompanying text.

[12] *See infra* notes 116–45 and accompanying text.

[13] *See infra* notes 146–59 and accompanying text.

[14] *See infra* notes 160–62 and accompanying text.

[15] This may be an appropriate time to spell out what this Comment does *not* purport to do. Although it is normative, in that it attempts to determine where the course of Supreme Court jurisprudence should flow in enforcing unenumerated economic rights, it does not attempt to pass upon whether the enforcement of such rights is a desirable, or even a permissible, judicial goal. Although the author believes that the experiment of judicially-defined unenumerated rights has *not* been a sterling success, defenses and attacks on the concept have been made in the past—with more skill than can be mustered here—by a variety of legal scholars.

II. THREADS OF THE PAST

The path led them to a steep set of steps (weeds had begun to push through the stonework already), and at the top Roland looked back over the [abandoned gardens]...

"So fell Lord Perth," murmured Roland.

"And the countryside did shake with that thunder," Jake finished.

Roland looked down at him with surprise, like a man awakening from a deep sleep, then smiled and put an arm around Jake's shoulders. "I have played Lord Perth in my time," he said.

"Have you?"

"Yes. Very soon now you shall hear."

– Stephen King[16]

Some scholars have suggested that the Court's substantive due process jurisprudence, particularly in the area of personal autonomy, is justified. *See, e.g.*, James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1 (1995) (arguing that democracy is supported by two "pillars": deliberative democracy, the right to vote as one sees fit, and deliberative autonomy, the right to make affirmative life choices); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989) (suggesting that the Court's jurisprudence in finding a right to privacy in cases like *Roe v. Wade*, 410 U.S. 113 (1973) is a protection against totalitarianism).

Other scholars have suggested that any use of substantive due process is impermissible. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990) (comparing substantive due process to the apple which tempted Adam and Eve in the Garden of Eden); Robert H. Bork, *Federalist Society Symposium Tenth Anniversary Banquet Speech*, 13 J.L. & POL. 513 (1997).

A tiny faction of scholars calls for the abdication of judicial review altogether, feeling that the practice is an open invitation for the minority, i.e. the judiciary, to impose created values on the will of the majority. *See, e.g.*, John O'Sullivan, *Court Disorder*, NAT'L REV., Aug. 6, 1990, at 6 (suggesting that judicial review ought to be abolished, because it places too much power in the hands of an unelected judiciary; this solution would effectively turn *all* questions concerning legislation into nonjusticiable political questions).

Finally, some scholars take a middle road, believing that the creation of unenumerated rights by the judiciary is permissible so long as it enforces only those rights implicit in the concept of democracy. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (arguing that the judiciary should create rights which insure that the processes by which laws are made are fair and equal; thus, a right to vote would be permissible, while a right to abortion would not); Edward B. Foley, *The Bicentennial of* Calder v. Bull, 59 OHIO ST. L.J. 1599 (1999) (stating that there are rights implicit in the nature of democracy that demand to be enforced, whether they are enumerated or not); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491 (1997) (suggesting that the judiciary should create rights which insure that individuals and institutions do not become politically entrenched, subverting the political process).

In any event, the rest of this Comment will assume that the enforcement of economic rights is a desirable goal, at least within the limits described *infra* Part IV.

[16] STEPHEN KING, WIZARD AND GLASS 125 (1997).

A. Lochner's Legacy

The cyclical nature of its jurisprudence notwithstanding, the Court does not always explicitly resurrect certain doctrines, either because they are legally or socially unpopular, or because they would expend the Court's political capital.[17] Economic substantive due process, for the last sixty years, has been the apotheosis of such doctrines.[18] Substantive due process, as every constitutional law class is taught, is the practice of giving substantive content to both Due

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[17] Political capital is a concept stemming from the idea that the Court (or any institution of government) can only "rock the boat" so much; it spends political capital by exercising its will in ways that flout the wishes of its co-institutions, or which defy the will of the People as a whole. For a general discussion of the Court's extremely limited political capital in the specific context of homosexual rights, see Louis Michael Seidman, Romer's *Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 SUP. CT. REV. 67, 98–99 (1996) (summarizing the criticism levied at the Court by liberal activists dissatisfied with the Court's inability to bring about real social change).

[18] Some believed that the Court's decision in *BMW v. Gore*, 517 U.S. 559 (1996), would herald a new age of at least some consideration of economic due process. In *Gore*, a punitive damages award issued against BMW for failing to notify the plaintiff that his car had sustained minor body damage was stricken as being excessive, and thus violative of general due process. However, *Gore* seems to have been applied only very narrowly, and has not resulted in a resurgence of economic substantive due process. This may be a result of the slightly procedural bent of the issue in *Gore*; because the jury followed an incorrect formula in calculating the amount of punitive damages, there is a colorable argument that the result was procedurally, and not substantively, unjust. *See* Jim Davis II, Note, BMW v. Gore*: Why the States (Not the U.S. Supreme Court) Should Review Substantive Due Process Challenges to Large Punitive Damage Awards*, 46 U. KAN. L. REV. 395 (1998); *see also* Neil B. Stekloff, *Raising Five Eyebrows: Substantive Due Process Review of Punitive Damages Awards After* BMW v. Gore, 29 CONN. L. REV. 1797 (1997).

It is important to remember that although the Court had, for a time, completely stopped using the language of due process in engaging the issue of economic rights, it has, within the last forty years, returned to evaluating economic due process claims using the test it developed in *Williamson v. Lee Optical*, 348 U.S. 483 (1955). Specifically, it now uses the "rational basis" test to evaluate such claims. This holds open the possibility that, at some point in the future, the Court may strike some economic regulation as violative of the Due Process Clause. However, under the terms of the rational basis test, this law would have to lack any basis in reason; it would be difficult to find such a law. *See* Michael J. Phillips, *The Nonprivacy Applications of Substantive Due Process*, 21 RUTGERS L.J. 537, 543–49 (1990) (discussing the various tests used by the Court in substantive due process cases outside the realm of personal autonomy).

Thus, while the Court has never explicitly rejected the idea of unenumerated economic rights, it has made the process of winning on such a claim virtually impossible. It is important to note, though, that some Justices, particularly Justice Kennedy, believe that the rational basis test still provides a means through which a plaintiff can assert a viable substantive due process claim. He says as much in the principal case, finding that the legislation involved there is not rationally related to any permissible government objective. *See* Eastern Enters. v. Apfel, 118 S. Ct. 2131, 2159 (1998) (Kennedy, J., concurring in the judgment and dissenting in part).

Process Clauses[19] of the United States Constitution. In other words, the doctrine gives the Court power to strike down legislation that is substantively, not just procedurally, abhorrent.[20] In truth, the Court has used this power almost exclusively to enforce rights that are outside the text of the Constitution; it has used substantive due process to *create* new rights. Among the rights created, at one time or another, are the right to own slaves,[21] the right to abortion,[22] and the right to live with one's extended family.[23]

Some unenumerated rights, though, are unlikely to find serious proponents in our constitutional culture.[24] Chief among these are the economic rights first

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[19] *See* U.S. CONST. amend. V ("[N]or [shall any person] be deprived of life, liberty, or property, without due process of law . . . ."); U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."). Courts give substantive content to these provisions by reasoning that any law which, in its substance is unjust, violates due process.

[20] John Hart Ely calls the phrase "substantive due process" an oxymoron in his seminal work *Democracy and Distrust*. He compares it to the phrase "pastel green redness": a concept that is, at its deepest levels, nonsensical. Ely argues that, because due process deals with the *processes* by which the People are governed, it cannot address itself to the substance of the laws they pass, unless that substance prevents the political processes from functioning correctly. *See* ELY, *supra* note 15, at 14–21.

[21] *See* Scott v. Sandford, 60 U.S. 393 (1856) (holding that laws which substantively deprived individuals of property—even slaves—were unconstitutional). *Scott*, commonly referred to as the *Dred Scott* decision, is widely held to have been the Supreme Court's worst hour, and one of the best reasons for disavowing the doctrine of substantive due process altogether. It is sometimes seen as one of the precipitating events of the Civil War. Recent scholarship suggests, though, that the jurisdictional aspects of *Dred Scott* may have been ignored in the race to condemn it as a substantive due process decision. *See, e.g.*, Christopher L. Eisgruber, Dred *Again: Originalism's Forgotten Past*, 10 CONST. COMMENT 37 (1993) (suggesting that scholarship linking *Roe v. Wade* and its progeny with *Dred Scott* is inaccurate and politically motivated).

[22] *See* Roe v. Wade, 410 U.S. 113 (1973) (creating an unenumerated right to reproductive autonomy); *see also* Planned Parenthood v. Casey, 505 U.S. 833 (1992) (plurality opinion) (upholding the result in *Roe* while modifying the core test used in its application).

[23] *See* Moore v. City of East Cleveland, 431 U.S. 494 (1977) (finding an East Cleveland municipal ordinance that forbade extended families and non-related persons from cohabiting to be unconstitutional as applied to extended families).

[24] No one, for instance, is likely to avoid a conviction for the use or possession of illegal substances on the grounds that they have a right to personal drug use. Indeed, this is one of the chief criticisms of the Court's substantive due process jurisprudence—that the Court picks and chooses what rights it will shield based on divisive social policy. Some scholars have pointed out that the same arguments which support the right to abortion support rights to such varied, unpopular, and illegal activities as drug use, incest, and polygamy, none of which are protected. *See* Foley, *supra* note 15, at 1606–13. Indeed, the essential irony of this position has not escaped the notice of the Court's current members. *See, e.g.*, Casey, 505 U.S. at 983–84 (Scalia, J., dissenting). Justice Scalia writes:

> The right to abort, we are told, inheres in "liberty" because it is among "a person's most

recognized in *Lochner v. New York*.[25] The "*Lochner* era" was marked by increased judicial interference in the decisions made by state legislatures in regards to economic matters, largely on the grounds that various laws inhibited the "freedom of contract."[26] These cases stood for the proposition that a state could not inhibit the right of its citizens to make their living in whatever way they saw fit; in order to restrict this freedom, the states were required to prove that the legislation was supported by some overridingly important governmental objective.[27]

The *Lochner* era came to an end with *Williamson v. Lee Optical*[28] and

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> basic decisions".... But it is obvious to anyone applying "reasoned judgment" that the same adjectives can be applied to many forms of conduct that this Court (including one of the Justices in today's majority) has held are *not* entitled to constitutional protection—because, like abortion, they are forms of conduct that have long been criminalized in American society. Those adjectives might be applied, for example, to homosexual sodomy, polygamy, adult incest, and suicide, all of which are equally "intimate" and "deep[ly] personal" decisions... and all of which can constitutionally be proscribed....

Id. (citations omitted) (emphasis in original).

[25] 198 U.S. 45 (1905) (holding that a New York law forbidding bakers to work more than sixty hours in a week was unconstitutional because it violated the "right to contract").

[26] *See id.* at 57 ("It is a question of which of two powers or rights shall prevail—the power of the State to legislate or the right of the individual to liberty of person and freedom of contract."); *see also* Fairmont Creamery Co. v. Minnesota, 274 U.S. 1 (1927) (holding that a Minnesota law forbidding dairy product buyers from discriminating between localities, irrespective of their motive, constituted an "interference with freedom of contract" that could be stricken on due process grounds); Chas. Wolff Packing Co. v. Court of Indus. Relations, 267 U.S. 552 (1925) (finding that the liberty of contract is guaranteed by the Due Process Clause of the Fourteenth Amendment, and may not arbitrarily be interfered with by legislative action); Coppage v. Kansas, 236 U.S. 1 (1915) (holding that a Kansas statute forbidding employers from using "yellow dog" contracts, which prohibited workers from joining unions, were unconstitutional under the Fourteenth Amendment). For a pre-*Lochner* rejection of economic substantive due process, see the *Slaugherhouse Cases*, 83 U.S. 36 (1872) (finding that, inter alia, the Due Process Clause of the Fourteenth Amendment could not be used to shield the economic rights of displaced butchers in New Orleans).

[27] In short, the Court was ruling that government actions which abridged this unenumerated "right to contract" would be subject to what later came to be called "strict scrutiny," under which such actions must be directly related to the accomplishment of an important government action. For a further explanation of the concept of strict scrutiny and other levels of judicial scrutiny, see Planned Parenthood v. Casey, 505 U.S. 833 (1992). *See also* United States v. Virginia, 518 U.S. 115 (1996) (explaining the concept of the strict scrutiny, rational basis, and intermediate tests in the context of equal protection). For a more general discussion of all these tests, see David Crump, *How Do Courts* Really *Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy*, 19 HARV. J.L. & PUB. POL'Y 795 (1996).

[28] 348 U.S. 483 (1955). *Williamson* suggests that economic legislation should be evaluated using only a "rational basis" test; that is, the Court should refrain from striking down economic legislation so long as it is rationally related to the accomplishment of a permissible

Ferguson v. Skrupka,[29] two cases which completely disavowed the Court's previous economic substantive due process cases. For some time, economic rights were almost disregarded, the *laissez-faire* economics that drove *Lochner* and its progeny disappearing,[30] and being replaced by a sense that the States should be allowed to control their own economic affairs, unhampered by the interference of the Court.[31] Although the Court[32] has, at times, shown a willingness to engage economic rights using the Due Process Clause,[33] no economic regulation has been found unconstitutional[34] since the Court decided *West Coast Hotel v. Parrish*,[35] in 1937.[36] A year later, in *United States v. Carolene Products*,[37] Justice Stone articulated in a justly-famous footnote[38] the principle that was to become the guiding light of substantive due process jurisprudence for the next sixty years: the Court would use the Due Process Clause to protect unenumerated rights of participation in the political process, particularly those of "discrete,

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government objective. The question, in other words, is whether the government has a rational basis for passing the law; if the basis is rational, then the Court will show deference to the will of the people as embodied by its legislature.

[29] 372 U.S. 726 (1963). *Skrupka* held that the Court had "abandon[ed] the use of the 'vague contours' of the Due Process Clause" as a means of evaluating economic legislation, see *id.* at 731, and seemed to imply that the rational basis test created by *Williamson* was even broader than it appeared at first blush. *See id.* at 729–30. The Court remarked that the "doctrine that prevailed in *Lochner*... has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies...." *Id.* at 730.

[30] *See* CHEMERINSKY, *supra* note 5, at 489–91. Justice Holmes, writing in dissent in *Lochner*, wrote that the majority was enacting a theory of economics into law: "This case is decided upon an economic theory which a large part of the country does not entertain.... The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). His accusation was that, in enforcing a "freedom of contract," the majority was making the practice of *laissez-faire* economics a constitutional imperative for state legislatures. *See id.*

[31] *See* CHEMERINSKY, *supra* note 5, at 489.

[32] Although the focus of this Comment is the practice of the Supreme Court itself, others have detected in lower court decisions the stirrings of economic substantive due process. *See* Phillips, *supra* note 18, at nn.46–58 and accompanying text (discussing the use in state and lower federal courts of substantive due process tests to invalidate standing legislation). Phillips believes that while there has been a slow reinvigoration of substantive due process over the past forty years, "recent decisions using substantive due process as an actual or possible basis for invalidating social and economic regulation remain a far cry from *Lochner*...." *Id.* at 549.

[33] *See supra* note 19.

[34] *See* CHEMERINSKY, *supra* note 5, at 491–93.

[35] 300 U.S. 379 (1937) (upholding minimum wage laws for women and striking down "freedom of contract").

[36] *See* CHEMERINSKY, *supra* note 5, at 489.

[37] 304 U.S. 144 (1938).

[38] *See id.* at n.4.

insular minorities," and those that were "fundamental rights."[39] "In other words," as one scholar puts it, "courts generally would presume that laws are constitutional."[40] Economic rights, after *Carolene Products*, became the "poor relations" of rights to personal autonomy.[41]

B. *A New Home for Economic Rights: The Takings Clause*

Economic rights jurisprudence never completely left us though, even in the days after the Court decided *Ferguson v. Skrupka* and *Carolene Products*. The Court began, before its seeming disavowal of "*Lochner*ism," to secure economic rights through other means.[42] The most important of these means was the Takings Clause.[43] It seems a perfect repository for economic rights: it avoids the problems of *Lochner* by being a specific, enumerated clause of the Constitution, and it deals specifically with property. Best of all, it leaves just enough judicial "wiggle-room" to hold additional content, while apparently retaining specific-enough content to constrain judges in their task of interpreting the Constitution. The rights "created" using the Takings Clause have, until this century, been limited in scope and number, constrained, perhaps, by the very literal language of the Clause itself.[44]

The Takings Clause was first invoked as a repository of economic rights by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*.[45] Although *Mahon* has been viewed in a variety of ways,[46] it is best known for Justice Holmes' majority

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[39] *See id.*

[40] *See* CHEMERINSKY, *supra* note 5, at 490.

[41] *See* Carol M. Rose, *Property Rights, Regulatory Regimes, and the New Takings Jurisprudence—An Evolutionary Approach*, 57 TENN. L. REV. 577, 580 (1990).

[42] As Professor Levy has pointed out, the Supreme Court has, over the years, undergone a cyclical process of reinvigoration and retreat from economic rights. In particular, he notes that the Court has used such tools as the Contracts Clause, the Equal Protection Clause, and various structural doctrines. *See* Levy, *supra* note 4, at 333.

[43] U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

[44] Although many issues have been argued in traditional Takings Clause cases, most such issues can be condensed into one of two central inquiries. The first, and arguably the more important, is the question of what constitutes a taking; the second is what, exactly, should earn the appellation "just compensation." *Eastern Enters. v. Apfel*, 118 S. Ct. 2131 (1998), may safely be placed in the list of cases which deals with the former issue.

[45] 260 U.S. 393 (1922) (finding that a Pennsylvania law forbidding land owners from mining coal out of land that might subside if excavated constituted a taking under the Fifth Amendment).

[46] *Mahon* is, in fact, one of the most frenzied points of conflict for scholars and Justices on both sides of the ideological spectrum. Some see it as the first regulatory takings case; others insist that it is, at its core, a substantive due process case. *See* William Michael Treanor, *Jam for Justice Holmes: Reassessing the Significance of* Mahon, 86 GEO. L.J. 813, 818–28 (1998)

opinion, which articulates the modern concept of a regulatory taking.[47] The regulatory takings doctrine was, for a long time, subject to much the same post-*Lochner* limitations as economic substantive due process.[48]

The history of the Takings Clause and the regulatory takings doctrine is well-known, and so will not be discussed in the body of this Comment at any length. It should suffice to say that the Court's regulatory takings jurisprudence has in recent years been expanded by the largely conservative Court.[49] These cases

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(evaluating various conceptions of what *Mahon* stands for).

[47] Regulatory takings have a storied history, beginning with *Mahon* and continuing into the modern era. A "regulatory taking" is so named because it does not involve a physical seizure of land or other property, but instead occurs when a government regulation renders property unusable by its owner. In practice, this most often happens with regulations that prevent an owner of land from performing specific tasks or building certain structures on his property. Regulatory takings involve an inherent expansion of the word "property" because the owner of the property is still in legal—and possibly physical—possession of the property. The government regulation in these cases does not result in a loss of the property, but in a loss of the usefulness of property. As such, it encourages a view of property as a "bundle of rights" attached to specific objects or intangible properties. So, for instance, if the government orders, as it did in *Mahon*, that owners of property cannot mine the coal out of their ground if it will cause subsidence, see *Mahon*, 260 U.S. at 412, they have taken away one of the rights that comes with ownership of the land.

In *Mahon*, Justice Holmes wrote that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415. The fundamental question of Takings analysis since that time has been, "What is 'too far?'" The answer, apparently, is the three-pronged test articulated by *Connolly v. Pension Benefit Guaranty Corp.*, see 475 U.S. 211, 224–25 (1986), and used by the Court in *Eastern Enterprises*, see 118 S. Ct. at 2146. *See infra* notes 71–81 and accompanying text.

For an excellent discussion of the regulatory takings doctrine that reiterates the above information, and evaluates the history of the Takings Clause as well as all of the cases mentioned above, in much greater depth, see CHEMERINSKY, *supra* note 5, at 510–19. Besides the ad-hoc test developed in *Connolly*, the Court has continued to evaluate regulatory takings based on physical occupation of property and deprivation of all "economically beneficial or productive use." *See* Matthew D. Zinn, Note, *Ultra Vires Takings*, 97 MICH. L. REV. 245, 245 n.3 (1998) (quoting Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992)); *see also* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 9-5 to 9-6 (1988).

[48] Alleged regulatory takings were, in other words, reviewed under a rational basis standard; if the government had a rational basis for regulating the use of property, the regulation was *not* a taking, and the government was not liable for payment.

[49] *See, e.g.*, *Lucas*, 505 U.S. at 1003 (holding that a government regulation that results in a one-hundred percent diminution in value is a taking, and leaving open the possibility that a lesser diminution in value might result in a regulatory taking); Nolan v. California Coastal Comm'n, 483 U.S. 825 (1987) (establishing a test that requires that a government body in charge of zoning, when confronted with an allegation that a zoning amounts to a taking, prove an "essential nexus" between the zoning and a substantial government interest); Dolan v. City of Tigard, 512 U.S. 374 (1994). For a discussion of these cases, see Elizabeth K. Arias, Note, Batch v. Town of Chapel Hill*: Takings Law and Exactions: Where Should North Carolina Stand?*, 21 CAMPBELL L. REV. 49 (1998).

indicated a new willingness on the part of the Rehnquist Court to exercise the regulatory side of the Takings Clause, and elicited a flurry of law review articles and speculation about the future of economic rights.[50]

III. THE PRESENT IN MOTION

Ye blind guides, which strain at a gnat and swallow a camel.

—*Matthew* 23:24[51]

If that were the end of regulatory Takings analysis, the doctrine of economic rights might well have stabilized; after all, even the very recent cases seem to follow the spirit of the Takings Clause, if not its letter.[52] We are confronted, here, with *Eastern Enterprises v. Apfel*.[53] In many ways, *Eastern Enterprises* may represent the pinnacle of the regulatory takings doctrine. For reasons that will shortly become apparent, it extends the ideas articulated in the earlier Takings cases, and in doing so, may expand the Takings Clause beyond any boundaries previously envisioned.

A. *The Facts of* Eastern Enterprises v. Apfel

The facts of *Eastern Enterprises* are relatively straightforward. During the 1930s, Eastern Enterprises was a coal mining company operating out of West

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[50] *See* Molly S. McUsic, *The Ghost of* Lochner*: Modern Takings Doctrine and Its Impact on Economic Legislation*, 76 B.U. L. Rev. 605, 667 (1996) (arguing that, while the current Court's takings jurisprudence gives it the same doctrinal and analytical tools as the *Lochner* Court, it has, and will, harness its power in a very limited way); *see also* Edward J. Sullivan, *Substantive Due Process Resurrected Through the Takings Clause:* Nolan, Dolan, *and* Ehrlich, 25 ENVTL. L. 155, 156 (decrying *Dolan* and its companion cases as substantive due process decisions, and predicting that, in the Court's use of the Takings Clause, "[a] more sophisticated form of Lochner v. New York is upon us"); *see generally* Daniel A. Crane, Comment, *A Poor Relation? Regulatory Takings After* Dolan v. City of Tigard, U. CHI. L. REV. 199 (1996); John E. Fee, Comment, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. CHI. L. REV. 1535 (1994); Brian B. Williams, Note, Dolan v. City of Tigard*: A New Era of Takings Clause Analysis*, 74 OR. L. REV. 1105 (1995). Until the Court's most recent term, with its decision in *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131 (1998), this speculation was merely idle, for the Court had not yet returned to its Takings Clause jurisprudence.

[51] Jesus uttered these words in condemning the Pharisees, who had, in their struggle to rigorously follow the letter of Jewish law, abandoned its spirit. The Pharisees, who followed strict canons of dietary law, strained their water through cheesecloth so as not to ingest any gnats that might be caught in the liquid. At the same time that they practiced this minor, albeit stringent, dietary rule, they violated the spirit of the scriptures in their political and private lives.

[52] *See infra* note 100 and accompanying text (discussing the purposes of the Takings Clause).

[53] 118 S. Ct. 2131 (1998).

Virginia and Pennsylvania.[54] The story behind *Eastern Enterprises* began when the United Mine Worker's Association (UMWA) demanded that coal operators begin to provide better health care benefits for their employees; these demands resulted, eventually, in a nationwide strike in 1946.[55]

This strike led to the intervention of the federal government in the form of the National Bituminous Coal Wage Agreement (NBCWA) of 1947, establishing a trust, funded by royalties on coal production,[56] to provide medical benefits for coal miners and their families.[57] This was followed quickly by the NBCWA of 1950, which established a royalty of thirty cents per ton of coal to be paid into the fund on a "several and not joint" basis, and distributed by the trustees of the funds as they saw fit.[58] Although subsequent amendments and revisions of the NBCWA (in 1968 and 1974, most notably) increased the amount of the royalty payments, they did not substantively alter the structure of the Act. The 1974 version of the Act, though, *did* guarantee medical coverage to coal miners, including retirees and their families.[59]

Following widespread dissatisfaction with this plan,[60] the Advisory Commission on United Mine Workers of America Retiree Health Benefits was formed to find a way to equitably fund retirement and medical benefits for retirees from coal mining companies that were no longer a part of the NBCWA.[61] The Commission proposed a solution that was eventually adopted as the Coal Act,[62] the statute at issue in *Eastern Enterprises*. It created a centralized trust funded by premiums paid by signatories of the previous NBCWA agreements. The Commissioner of Social Security was placed in charge of the Fund, and ordered to calculate the premiums to be paid by the participants in previous NBCWA agreements according to a fixed formula.[63]

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[54] *See id.* at 2142–43.

[55] *See id.* at 2137.

[56] This trust was called the United Mine Workers of America Welfare and Retirement Fund. The trustees of the fund, appointed by the parties, would determine what benefits coal miners and their families would receive under the agreement. *See id.* at 2138.

[57] *See id.*

[58] *See id.* Note that this also meant that the benefits were subject to termination at the will of the trustees.

[59] *See id.* at 2140.

[60] *See id.* The Court attributes this to the rising cost of contributing to the Fund. As individual companies left the Plan because of the availability of cheap non-union labor, the cost had to be spread across the still-participating companies, causing costs to rise even further.

[61] *See id.*

[62] 26 U.S.C. § 9706 (1994).

[63] This formula, as repeated by the Court, and as it originally appeared in the Act, is as follows:

> For purposes of this chapter, the Commissioner of Social Security shall . . . assign

The Commissioner (Kenneth Apfel, respondent in *Eastern Enterprises*) assigned to Eastern the obligation for premiums respecting over one thousand retired miners.[64] The problem with this assignment was that Eastern had sold its interest in any coal mining ventures in 1987, long before the enactment of the Coal Act.[65] Eastern would thus, under the Coal Act, be forced to pay vast amounts of money that it could not have foreseen—over five million dollars for a twelve-month period, at the time of the Court's decision[66]—when it acted as signatory to the original NBCWA. Eastern sought a declaratory judgment that the Coal Act, as applied to it retroactively, was unconstitutional.[67]

B. *The Plurality Opinion*

The plurality opinion,[68] written by Justice O'Connor, first disposes of largely irrelevant procedural issues.[69] The plurality begins its Takings Clause analysis with the observation that, although the *Eastern Enterprises* fact pattern does not

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each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business in the following order:
(1) First, to the signatory operator which—
(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and
(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.
(2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which—
(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and
(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.
(3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

Eastern Enters., 118 S. Ct. at 2142 (citing 26 U.S.C. § 9706(a)).

[64] *See id.* at 2143.

[65] *See id.* Under the terms of the sale, the company that purchased the remainder of Eastern's already-dwindling coal mining interests assumed "responsibility for payments to . . . benefit plans . . . ." *Id.*

[66] *See id.*

[67] *See id.* at 2144–45.

[68] *See id.* at 2137–53.

[69] *See id.* at 2144–46. Essentially, a jurisdictional issue arose because the Court of Federal Claims has exclusive jurisdiction over actions against the Government for damages exceeding ten thousand dollars that are based on any part of the Constitution; Eastern brought its claim in federal district court. Ultimately, the Court decided that Eastern had properly brought its action in district court because it sought a declaratory judgment for an injunction, not money damages.

involve a "[c]lassic taking[s]" situation, the regulatory takings doctrine is an appropriate vehicle with which to resolve the constitutionality of the Coal Act.[70]

The test which will be determinative of whether a regulatory taking has occurred is drawn by the Court from *Connolly v. Pension Benefit Guaranty*.[71] *Connolly* involved a retroactive legislative scheme similar to that challenged in *Eastern*, and "left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience."[72] A court considering whether a governmental action is an unconstitutional taking must consider: (1) how severe the economic impact of the governmental action will be, (2) whether the act interferes with reasonable investment-backed expectations, and (3) the character of the governmental act.[73]

Application of these factors proves fairly easy for the plurality. It finds, first, that the economic impact of the Coal Act on Eastern will be a "considerable financial burden."[74] In essence, the plurality writes, Eastern is being forced to pay an amount that was "[calculated] in a vacuum."[75] Under this analysis, the economic impact of the Commissioner's decision is severe because Eastern's liability is completely arbitrary: "[T]he correlation between Eastern and [the circumstances giving rise to] its liability to the . . . Fund [is too] tenuous . . . . The company's obligations under the Act depend solely on its roster of employees . . . 50 years before the statute's enactment, without any regard to responsibilities that . . . [it] accepted . . . ."[76]

Second, the plurality writes that the Coal Act's retroactive effect significantly interferes with Eastern's reasonable investment-backed expectations by "attach[ing] new legal consequences to [an employment relationship] completed before its enactment."[77] In general, the plurality holds that this is so because retroactivity is heavily disfavored in our law as promoting uncertain and unfair results. Citing *Calder v. Bull*[78] for the proposition that the Takings Clause forbids

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[70] *See id.* at 2146 (citation omitted). The Court characterizes a classic taking as one that involves "a physical invasion by government." *Id.* (quoting Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).

[71] 475 U.S. 211 (1986).

[72] *Eastern Enters.*, 118 S. Ct. at 2149.

[73] *See id.* at 2146 (citing Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979); *see also Connolly*, 475 U.S. at 224–25). The plurality notes, though, that the factors do *not* comprise a test that is mechanical in nature; they simply create a lens through which the Court can view the problem of regulatory takings.

[74] *Id.* at 2149.

[75] *Id.* at 2150 (quoting *Connolly*, 475 U.S. at 225).

[76] *Id.*

[77] *Id.* at 2151 (quoting Landsgraf v. USI Film Prods., 511 U.S. 244, 270 (1994)).

[78] 3 U.S. (3 Dall.) 386 (1798).

retroactive legislation relating to property interests,[79] the plurality concludes its argument by stating that, on the facts of the case, Eastern could not have foreseen that it would be liable for lifetime medical benefits for miners who left its employ more than a quarter of a century ago, particularly when the agreements signed by Eastern had explicitly left open the question of medical care for mine workers and retirees.

Finally, the plurality concludes that the "nature of the governmental action in this case is quite unusual."[80] They find that the Coal Act is unusual because it picks out an employer and assigns liability based on conduct that occurred in the distant past, and for purposes with which the employer had no involvement. Ultimately, the plurality concludes that the nature of the Commissioner's ability to retroactively assign liability to companies is so unusual that it amounts to an exercise of eminent domain under the regulatory takings doctrine.[81]

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[79] *See Eastern Enters.*, 118 S. Ct. at 2151. The plurality quotes Justice Chase, who wrote that "[t]he restraint against making any *ex post facto laws* was not considered . . . as extending to prohibit the depriving a citizen even of a *vested right to property*; or the provision, 'that *private* property should not be taken . . . without just compensation,' was unnecessary." *Id.* (quoting *Calder*, 3 U.S. at 394). Of course, legislation that is retroactive in particular areas (e.g. tax) is almost never ruled unconstitutional.

[80] *Id.* at 2153.

[81] *See id.* It may be prudent here to note two opinions upon which this Comment will *not* touch. In the first of these opinions, Justice Stevens, in a simply-structured dissent, writes that the critical question—for either a substantive due process or Takings Clause analysis—about the Coal Act is whether or not the signatories to earlier NBCWA agreements could have foreseen that they would be forced to pay the current premiums. *See id.* at 2160–61 (Stevens, J., dissenting). Examining the record, he concludes that the lower courts who passed judgment on the case were right—as was the Coal Commission—in determining that Eastern and other signatory companies had an implicit understanding that they would provide lifetime health benefits for their retirees. *See id.* Given this implicit understanding, Justice Stevens concludes, the Coal Act does not constitute an unconstitutional taking: "Rather, it seems to me that the plurality . . . [has] substituted [its] judgment about what is fair for the better informed judgment of the Members of the Coal Commission . . . ." *Id.* at 2161. Thus, Justice Stevens' position is that the Coal Act, as applied to Eastern, is constitutional, whichever test is used in the evaluation. Given this conclusion, it is no surprise that Stevens does not delve any further into the question of which test is appropriate.

In the second of these opinions, Justice Thomas also takes a slightly different stance on the facts presented by *Eastern Enterprises*. Thomas writes that, although he agrees with the majority that a taking occurred in the Commissioner's application of the Coal Act to Eastern, he would use the *Eastern Enterprises* dilemma as an opportunity to overturn the ages-old decision in *Calder* that the Ex Post Facto Clause of the Constitution does not apply to civil laws. *See id.* at 2154 (Thomas, J., concurring). Although this is ultimately a more grounded solution than the majority's use of the Takings Clause, it is an unlikely answer to the problem of retroactivity; the reversal of *Calder* would overturn the cornerstone case concerning retroactivity and would likely throw legislatures across the country into a state of chaos in regards to statutes touching on civil matters—including, inter alia, taxation and laws affecting private litigation and claims between parties.

IV. FUTURE IMPERFECT

What we've got here . . . is a failure to communicate.

– Cool Hand Luke[82]

The plurality's holding in *Eastern Enterprises* is rife with difficulties. There are conceptual problems that make the decision all but incomprehensible in application. Ultimately, though, these conceptual problems may be of little concern; indeed, some commentators have suggested that the holding in *Eastern Enterprises* will be confined to its own peculiar facts.[83] Whether or not this is so, it seems clear that lower courts will be required to struggle with the plurality's reasoning until the Court finds time to address the Takings Clause again. They will, if the opinion itself is any indication, have some difficulty in doing so. Taken to its inevitable conclusion, the plurality's logic has the potential to change the very nature of the Takings Clause as it has always been understood.

The plurality's reasoning is particularly egregious in three ways. First, it abandons the requirement of a specific property, creating an interpretational tension with traditional takings doctrine. Second, it shows an essentially flawed conception of takings when it finds that the government has exercised its power

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[82] COOL HAND LUKE (Warner Bros. 1967).

[83] *See Leading Cases*, 112 HARV. L. REV. 122, 212–22 (1998) (concentrating on the changes that the plurality and dissenting opinions inflict on established substantive due process and takings tests, without evaluating the problems inherent in the plurality's logic, and concluding that the various Justices are all examining the facts of *Eastern Enterprises* through the same "jurisprudential lens").

This general feeling that *Eastern Enterprises* will be construed narrowly may well be the result of the fact that the case was decided by a plurality. Although Justice Thomas joins with the core holding of the plurality in his concurring opinion, see *Eastern Enters.*, 118 S. Ct. at 2154 (Thomas, J., concurring), Justice Kennedy balks at the idea of adding any new conceptual threads into the already-existing Takings Clause jurisprudence. *See id.* at 2154–60 (Kennedy, J., concurring in the judgment and dissenting in part). In any event, given the current composition of the Court and the tentative nature of the plurality, *Eastern Enterprises* may well be constrained to its facts.

The plurality opinion's ultimate importance may also be limited by the fact that it deals with retroactive legislation. Such legislation is, and always has been, distrusted in our law, and every Justice in *Eastern Enterprises* makes special note of this fact. The Framers themselves feared retroactivity to such a great extent that they wove an admonition against it into the very fabric of the Constitution they had crafted, in the form of the Ex Post Facto Clause. But for an early twist of jurisprudential fate in *Calder*, the Ex Post Facto Clause might well have ended the need for speculation about which constitutional provision serves to invalidate the Coal Act. In any event, the Court's very palpable distrust of laws that create substantial retroactive liability may have played a crucial part in its decision to invalidate the legislation in *Eastern Enterprises*. If some other economic right had been asserted by Eastern, the complexion of the case might well have been very different.

of eminent domain by causing private parties to pay one another.[84] Finally, the plurality fails to heed the basic nature of the Takings Clause by using it to strike down legislation, when the Clause has never been understood to hold such power.

A. *The Requirement of a Specific Property*

The most problematic part of the plurality's opinion is the way in which it stretches previous conceptions of the Takings Clause almost to incoherence. Particularly egregious is its failure to consider exactly *what* property interest was at stake in the Commissioner's application of the Coal Act. That is, the Commissioner determines liability based on a formula that yields a very specific dollar amount for which signatory entities are liable.[85] It is important to note, for purposes of takings analysis, that the dollar amount that the Commissioner assigns need not be drawn from a specific property; indeed, the statute does not authorize the Commissioner to attach corporate property or otherwise designate the source from which funds are to be drawn.[86] *Eastern Enterprises* would be a much less problematic case if the Commissioner had been given such power.

In no other case has the Court found a taking like that involved in *Eastern Enterprises*.[87] The nature of previous regulatory takings suggests that some specific property interest must be cut off, or at least devalued.[88] There is no doubt

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[84] *See Eastern Enters.*, 118 S. Ct. at 2146.

[85] *See supra* note 63 (reproducing the formula authorized by the Coal Act).

[86] Such a provision in the Coal Act would have made the plurality's task even easier, and might have garnered takings votes from some of the other Justices; after all, the power to seize a specific property would have more closely resembled the governmental actions which have traditionally garnered the regulatory taking appellation.

[87] Although the Court has confronted legislative schemes very similar to the Coal Act, it has not, until *Eastern Enterprises*, invalidated such a scheme by using the regulatory takings doctrine. The *Eastern Enterprises* plurality cites *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) as an example of a case involving a legislative scheme very similar to the one created by the Coal Act. *See Eastern Enters.*, 118 U.S. at 2146–47.

In *Usery*, the Black Lung Benefits Act of 1972 (30 U.S.C. § 901) required mining companies to pay specified miners for injuries relating to black lung disease, using a formula similar to that established by the Coal Act. In that case, the Court rejected a due process challenge, stating simply that they could not, in good faith, say that the legislation acted in an "arbitrary and irrational way." *See Usery*, 428 U.S. at 15–17.

In *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986), the Court evaluated the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) (29 U.S.C. §§ 1381-1461) under both a takings and substantive due process analysis.

[88] Indeed, for most of the Constitution's history, the term "taking" referred solely to actual expropriations of property:

> While the term "take" is not defined in the Constitution, it most naturally means an expropriation of property, such as when the government exercises its eminent domain power to acquire private property. . . .

that the Court sometimes uses a great deal of creativity in defining the word "property" with regard to the government's exercise of eminent domain.[89] The *very foundation* of the regulatory takings doctrine is an expansion of the concept of property.[90] But there are limits to the elasticity of the concept of specific property interests—stretch the concept too far, and *everything* becomes property.

The requirement of a specific property serves very important purposes in analyzing particular government actions as exercises of eminent domain. First among these purposes, as we shall discuss later,[91] is that it mitigates the conceptual difficulty inherent in fixing just compensation, a price, for what was taken, when no specific property has been designated. Furthermore, the government is generally able to levy fines or assess liability for sums of money; no one has ever suggested that a *tax* should be considered a taking, for instance.[92]

In a sense, the plurality's method of framing the Takings Clause is most troublesome in that it extends the concept of property to the *mere presence of value*. That is, when the Takings Clause applies without the condition of

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> This plain language interpretation of the clause is consistent with both the intent of the framers of the Constitution and the opinions of the Supreme Court in the eighteenth and early nineteenth centuries. While there is considerable academic disagreement over the framer's [sic] general views on property, there is little debate that the framers believed that the Takings Clause only would prohibit actual expropriations of private property. Even justices like Antonin Scalia, who have applied the clause beyond its text and original meaning, start from a recognition [of this fact]. Similarly, there is no dispute that until the second half of the nineteenth century, the Supreme Court steadfastly refused to extend the doctrine....

Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. ENVTL. AFF. L. REV. 509, 515–16 (1998) (citations omitted).

[89] The Court has been increasingly willing to view property as a "bundle of rights." For instance, the Court has determined that the ability to use land for a particular purpose, knowledge of trade secrets, and receipt of welfare are all protectible property interests. *See* United States v. Causby, 328 U.S. 256 (1946) (holding that overflights by Government planes, making it impossible for the owner of certain land to operate a chicken farm there, constituted a taking); *see also* Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) (holding that trade secrets are property under the Takings Clause); Goldberg v. Kelly, 397 U.S. 254 (1970) (stating that welfare benefits are property, and thus cannot be terminated without due process of law). *See generally* CHEMERINSKY, *supra* note 5, at 519–22. For a general discussion of Justice Holmes's peculiar ability to transform economic disadvantage created by Government regulation into "property," see Robert Brauneis, *"The Foundation of Our 'Regulatory Takings' Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in* Pennsylvania Coal Co. v. Mahon, 106 YALE L.J. 613 (1996).

[90] This statement is true because the regulatory takings doctrine extends the concept of property beyond common law understandings of the term to encompass the right to use a specific property. *See, e.g.*, *Causby*, 328 U.S. at 256; *see also supra* note 89.

[91] *See* discussion *infra* Part IV.C.

[92] Until now, that is. *See* discussion *infra* Part IV.B.

specificity, it may be argued that any government action which results in the transfer of funds is a taking. Although taxes would certainly be a part of this equation, they are not the most troublesome area of the law that might be touched by a conception of the Takings Clause that lies outside the ambit of the specific property requirement.

Consider the thousands of government-ordered arbitrations and regulatory hearings that occur every day in the United States, and the millions of lawsuits decided every year. If the Commissioner's ability to retroactively assess Eastern's liability under the Coal Act constituted a regulatory taking, why would the situation be substantively different if a quasi-legislative or even a judicial body were to assign retroactive liability to a defendant in a civil suit? Conceptually, the question is a difficult one, for the answer seems to be that it would not.

Indeed, it is difficult to ascertain why the plurality's reasoning could not be extended to transactions that occur with a great deal more frequency than the arbitration just mentioned. In a philosophic sense, one of the major functions of modern government is to assess the liability of citizens for acts they have committed in the past. Why, then, is there no taking when a judicial body—say, a Mayor's Court in Groveport, Ohio or the Franklin County Court of Common Pleas—assesses a fine against a citizen for some past behavior? Nor when an administrative agency created by legislative fiat—say, the Environmental Protection Agency—sets and levies the fines for violating regulations that it created? This latter situation is particularly troublesome under the *Eastern Enterprises* plurality's reasoning, for it appears, at least cursorily, to be almost identical to the *Eastern Enterprises* fact pattern, except that the fines involved in the EPA example are paid directly to the government, a fact that militates *in favor* of finding a taking.[93]

This, then, is the logical end result of the plurality's decision in *Eastern Enterprises*: it hopelessly muddles the very idea of eminent domain as it is applied in regulatory contexts. It opens the door to endless charges of takings in every administrative context, in every area of our daily lives in which the organs of government are called upon to create new laws that respond to the needs of citizens. After *Eastern Enterprises*, it may be difficult for administrative agencies, not to mention municipal and local governments, to frame legislation that is takings-resistant, particularly when that legislation has some retroactive effect. Clearly, in finding that Eastern possessed a right to be free of the retroactive legislation directed at it by Congress, the Court was required to stretch the Takings Clause beyond its meaning.[94]

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[93] There are, of course, other arguments that explain the seeming immunity of most judicial decisions of *any* character from the Takings Clause, but these arguments fall outside the essential scope of this Comment.

[94] This flaw in the plurality's analysis does not escape the notice of the other Justices who participated in *Eastern Enterprises*. Justice Kennedy, in his strongly-worded concurrence, begins his analysis with the observation that the Takings Clause is centered around the concept

B. *A Taking by Private Parties*

In addition to the Court's apparent problems in constraining the concept of property, there are other difficulties that mar the Court's new expansion of the Takings Clause. In particular, the nature of the agreement codified by the Coal Act is difficult to frame in terms of eminent domain. The Coal Act takes property from a specified group of private individuals—in this particular case, the owners of Eastern—and gives it to the government for distribution to another group of private individuals, the "orphaned" coal miners and their families.[95] Traditionally, the Takings Clause is applied only to situations in which an organ of the government takes something for its own use, not when it orders one individual to pay another.[96]

As an ideal, this makes sense. The classic purpose of the Takings Clause was to pay citizens for property seized by the government during emergencies[97] or for the institution of public works.[98] It is a bulwark designed to insure that selected property owners are never forced to pay for social enhancements (*e.g.*, roads, military bases, public utilities) that benefit us all.[99] A taking is, in short, one of the

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that the government should not be allowed to use someone's *property* without compensation. *See Eastern Enters.*, 118 S. Ct. at 2154 (Kennedy, J., concurring in the judgment and dissenting in part). For Justice Kennedy, this means that the government must take *specific* property—the act of requiring a certain amount of money is simply not enough, even though the "liability imposed on Eastern no doubt will reduce . . . its total value." *Id.* at 2156.

Justice Breyer, too, finds fault with the plurality's use of the Takings Clause primarily because of the *type* of interest at stake in *Eastern Enterprises*. He writes, like Justice Kennedy, that the Takings Clause requires the Government to have seized or at least cut off the use of some *specific* property interest. *See id.* at 2162 (Breyer, J., dissenting). Although he finds no general fault with the regulatory takings doctrine itself, he notes that every case in which the doctrine has been invoked has been concerned with "interests in *physical* property," or "monetary interest[s] . . . [that] . . . arose out of the operation of a specific, separately identifiable fund of money." *Id.*

[95] *See id.* at 2142 (plurality opinion).

[96] In fact, until the decision in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), and the expansion of the regulatory takings doctrine, it was assumed that the Takings Clause applied only to purely physical appropriations of property. *See supra* note 88 and accompanying text.

[97] For instance, some government seizures of property are considered takings even during times of war. *See* United States v. Pewee Coal Co., 341 U.S. 114 (1951) (holding that a government seizure of coal mines during a strike was a taking, despite the fact that the mines were occupied by the government during a national strike, during a time of war). *But see* United States v. Caltex, Inc., 344 U.S. 149 (1952) (holding that the government's preemptive destruction of plaintiff's oil rigs to prevent their seizure by the Japanese enemy was *not* a taking). For a general discussion of war time seizures and other "exceptions" to the Takings Clause, see CHEMERINSKY, *supra* note 5, at 509–10.

[98] As when a state or local government "creates an easement" using its power of eminent domain over an individual's property in order to build a road, sewage line, or other work of general public use.

[99] "[A principal purpose of the Takings Clause is] to bar the Government from forcing

few situations in which the government explicitly takes on the role of the People, and purchases property in their name and for their use. This essential purpose does not jibe with a view of the Takings Clause that touches upon government-ordered transactions between private individuals. It is difficult, conceptually, to understand why the Takings Clause would apply to such transactions.[100]

After all, like the act of assigning liability for past acts, one of the primary functions of modern government is to mediate disputes between individual members of society, and between businesses and citizens. Although this function falls primarily on the judiciary, the work of the legislature and the executive often entails making value judgments about the competing property interests of individuals and organizations, particularly in administrative contexts and at local levels. It calls, in short, for various government officials, on occasion, to order one citizen to pay another.[101] The plurality's vision of the Takings Clause promises to hopelessly muddle the work of such officials in applying their given responsibilities, and perhaps even to throw into confusion the work of the judiciary.[102] As Justice Breyer writes in *Eastern Enterprises*: "[There is no taking where] the Government does not physically invade or permanently appropriate

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some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49 (1960).

[100] Note that this is *not* a textual requirement—the actual language of the Takings Clause does not make any distinction between a taking by the government for the benefit of a private individual and a taking by the government for its own use. But to read the Takings Clause as relevant to government-ordered transactions is to ignore the basic policies that underlie it, and to abandon the case law which has interpreted the Clause for two hundred years. The fact that the specific text of the Takings Clause can be read to include such transactions should hold no more weight than the fact that it does not preclude judicial decisions from being the subject of takings charges; it has, of course, rarely been understood to include either.

[101] Or as the plurality in *Eastern Enteprises* itself writes: "In the course of regulating commerical and other human affairs... Congress routinely creates burdens for some that directly benefit others." Eastern Enters. v. Apfel, 118 S. Ct. 2132, 2147–48 (1998) (quoting Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 223 (1986)).

[102] For instance, there may be a colorable takings claim under this logic when a court finds that an individual must grant an easement to his neighbor. After all, the claimant can argue that the government has effectively given his property to another without compensating him for it.

Of course, a court is likely to argue in such a situation that it has simply determined who owned the property all along, under relevant statutes and case law. It is likely, in short, to conclude that the decision in such a case is not a manifestation of positive law—that the court did not *create* the property right that now resides in the easement holder—but is instead a "discovery" or determination of a pre-lawsuit condition of property ownership.

any . . . *assets for its own use.*"[103] The result in *Eastern Enterprises* cannot be good.[104]

C. *The Lost Meaning of Just Compensation After* Eastern Enterprises

Finally, the decision in *Eastern Enterprises* hopelessly muddles fundamental understandings about the way in which the Takings Clause is meant to operate. Traditionally,[105] and on its face,[106] the Takings Clause does not seem to *deny* the

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[103] *Eastern Enters.*, 118 S. Ct. at 2162 (Breyer, J., dissenting) (emphasis in original) (citing *Connolly*, 475 U.S. at 225). Interestingly enough, it is from *Connolly* that the plurality draws the takings test with which it invalidates the Coal Act. *See id.* at 2147–49; *see also supra* notes 71–81 and accompanying text (discussing the Court's application of *Connolly* to the *Eastern Enterprises* fact pattern).

[104] Nor does the apparently unique nature of the taking in *Eastern Enterprises* escape the notice of Justice Breyer; this particular flaw in logic prompts him to write that the plurality's Takings Clause analysis "bristles with conceptual difficulties[:] If the [Takings] Clause applies when the government simply orders A to pay B," he writes, "why does it not apply when the government orders A to pay the government . . . ?" *Eastern Enters.*, 118 S. Ct. at 2162 (Breyer, J., dissenting). In other words, Justice Breyer believes that the nature of the transaction covered by the Takings Clause in *Eastern Enterprises*, coupled with the lack of a specific property interest at stake, combines to create an interpretational scheme in which both a tax levied by the government and a government-ordered transaction between two individuals is no different, substantively, from a physical invasion of property. Strikingly, the plurality never answers this charge.

Justice Kennedy, on the other hand, indicates that the nature of the transaction does not particularly affect his judgment one way or another:

> The circumstance that the statute does not take money for the Government but instead makes it payable to third persons is not a factor I rely upon to show the lack of a taking. [Although] there are instances where the Government's self-enrichment may make it all the more evident a taking has occurred.

Id. at 2156 (Kennedy, J., concurring in the judgment and dissenting in part).

[105] Justice Kennedy, for instance, in his concurring opinion, cites *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), for the proposition that the Takings Clause does not *prohibit* acts which are otherwise constitutional. *See Eastern Enters.*, 118 S. Ct. at 2157 (Kennedy, J., concurring in the judgment and dissenting in part). The *First Evangelical* Court said:

> [The Takings Clause] does not prohibit the taking of private property, but instead places a condition on the exercise of that power. This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.

First Evangelical, 482 U.S. at 314–15 (emphasis in original) (citations omitted).

[106] The Clause states that the government shall take no property "without *just*

government the ability to do any act. It simply says that Congress cannot perform specific acts (takings) without "just compensation."[107] Yet the plurality in *Eastern Enterprises* completely disallows the Commissioner's application of the Coal Act to Eastern. Clearly, this is not, on the plain face of the Constitution, a proper result. Justice Kennedy says as much in his concurrence in *Eastern Enterprises* when he writes that the Takings Clause simply "operates as a conditional limitation, permitting the Government to do what it wants so long as it pays the charge."[108] The Takings Clause is thus a conditional device, not a prohibitory one.

The plurality's confusion of this issue may result from its failure to identify a specific property interest which is the subject of a "taking."[109] Logically, the government cannot compensate an individual or a company for actions that amount to a seizure of cash. The only payments which the government has ever used as just compensation for a taking are like-kind, but only very rarely, and cash, the method most often used.[110] Presumably, under traditional concepts of eminent domain, the government must give over the fair value of what it took. The fair value of a specific sum of money is, obviously, the amount of money taken; the concept of a taking or of just compensation in this situation is simply impracticable.[111]

Consider how the *Eastern Enterprises* fact pattern would be analyzed using a traditional Takings Clause analysis: the Commissioner of Social Security would be free to continue the action that violates the Clause—in this case, the assessment of liability against Eastern—so long as his office (or some part of the government) gives Eastern its just compensation for the action. The value of the

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compensation," implying that takings are still valid governmental actions, so long as the "takee" is justly compensated for his property. *See* U.S. CONST. amend. V (emphasis added).

[107] *See id.*

[108] *Eastern Enters.*, 118 S. Ct. at 2157 (Kennedy, J., concurring in the judgment and dissenting in part).

[109] *See* discussion *supra* Part IV.A and accompanying notes.

[110] *See* 16 U.S.C. § 20e (1994) for one definition of just compensation. It reads, in part:

> Unless otherwise provided by agreement of the parties, just compensation shall be an amount equal to the sound value of such structure, fixture, or improvement at the time of taking by the United States determined upon the basis of reconstruction cost less depreciation evidenced by its condition and prospective serviceability in comparison with a new unit of like kind, but not to exceed fair market value.

Id.

[111] The plurality writes that the *Eastern Enterprises* fact pattern represents a situation in which "monetary relief against the Government is [not] an available remedy." *Eastern Enters.*, 118 S. Ct. at 2145. This statement, in retrospect, could not be more correct. Ironically, the Court admits that monetary compensation—the only relief appropriately available under the Takings Clause—is unavailable, but fails to take the additional step that an honest assessment of the facts requires: that these facts are poorly fitted to a takings analysis.

contribution that must be returned is, of course, the exact amount paid into the fund. This is an incoherent result, and reveals, at its core, the way in which the plurality's opinion is at war with the substance of the Takings Clause. Clearly, even if the Court had not specifically written that its decision acted to strike down the Coal Act,[112] the practical effect of the situation described above is to make application of the Coal Act to Eastern—or to anyone similarly situated—fruitless. Envisioned this way, the result reached by the plurality is at its core incoherent; the Takings Clause simply does not empower the Court to *strike down* any legislation.

In addition, the plurality's conception of the Takings Clause as applying to government-ordered transactions between individuals[113] may lead to its use as an instrument with which to strike down legislation. After all, how does one frame what the idea of "just compensation" might mean when the government orders one individual to pay another for some past obligation—whether the obligation was truly incurred or not? Even if one does not consider such ideas as the time-value of money and the practical difficulties in ascertaining the value of an obligation incurred in the past, the operative question of how much the *government* owes for enforcing its justice is a seemingly impossible one. The line-drawing problems presented by such a scenario are staggering.

In combination, the Court's fundamental misunderstanding of the property interests that must be at stake to facilitate a taking and the nature of its power to enforce the Takings Clause act to undermine the fundamental coherence of its economic rights jurisprudence. When the Court is forced to extend the Takings Clause to the boundaries of common sense, as it does in *Eastern Enterprises*, it is clear that it is doing so because the concept of eminent domain cannot contain the weight of unenumerated economic rights, even a right as uncontroversial as the right to remain unaffected by retroactive legislation.[114] The regulatory takings doctrine, no matter how useful it may have been in the past as a means of sketching out the contours of economic rights jurisprudence,[115] has been stretched to the snapping point, if the plurality's opinion in *Eastern Enterprises* is any indication of things to come.

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[112] *See id.* at 2153. The plurality writes:

> In enacting the Coal Act, Congress was responding to a serious problem with the funding of health benefits for retired coal miners. While we do not question Congress' power to address that problem, the solution it crafted improperly places a severe, disproportionate, and extremely retroactive burden on Eastern. Accordingly, we conclude that the Coal Act's allocation of liability to Eastern violates the Takings Clause, and that 26 U.S.C. § 9706(a)(3) should be enjoined as applied to Eastern.

Id.

[113] *See* discussion *supra* Part IV.B.

[114] *See supra* note 83.

[115] *See supra* note 50.

V. FULL CIRCLE

So we beat on, boats against the current, borne back ceaselessly into the past....

–F. Scott Fitzgerald[116]

The wheel of time has come full circle; the high Court feels some compulsion to protect the unenumerated economic rights of citizens, and it has chosen a primary vehicle, the regulatory takings doctrine, which is clearly at war with common sense. It seeks to weave a pattern similar to that achieved by *Lochner*-era jurisprudence with the thread of a clearly unsuitable doctrine. The question, then, is whether any other doctrine of constitutional interpretation, or any other provision of the Constitution, can provide us with a more logically consistent place from which to derive unenumerated economic rights.

For the reasons that follow, the doctrine of substantive due process, although much-maligned by post-1937 Courts and scholars—with some exceptions[117]—is a superior alternative to the regulatory takings doctrine in this regard. Although the advantages accorded by substantive due process are many, there are, in particular, three reasons that the Due Process Clause is a superior vehicle for unenumerated rights. First, the regulatory takings doctrine and the substantive due process doctrine are so intertwined that they are nearly indistinguishable; regulatory takings are, in fact, little more than substantive due process "dressed up" as something a little more palatable. Second, the use of the substantive due process doctrine will provide a balance to the Court's jurisprudence of unenumerated fundamental rights that cannot be achieved with the current regulatory takings doctrine, even before the potentially unbalancing effects of the decision in *Eastern Enterprises*. Finally, the use of substantive due process to protect unenumerated rights promises, frighteningly enough, to provide a consistency, a certainty, that the regulatory takings doctrine cannot.

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116 F. SCOTT FITZGERALD, THE GREAT GATSBY 189 (Collier, 1992) (1925).

117 As mentioned before, the Court has recently shown a very limited willingness to engage some economic rights by using substantive due process. *See supra* note 18 and accompanying text (discussing the Court's recent decision in *BMW v. Gore*, 517 U.S. 559 (1996)). In addition, at least one commentator has suggested that the *Lochner* era did not result in nearly the amount of judicial activism with which it is credited. *See* Michael J. Phillips, *How Many Times Was* Lochner*-Era Substantive Due Process Effective?*, 48 MERCER L. REV. 1049 (1997) (performing a numerical study of the case law, concluding that the number of statutes invalidated on economic substantive due process grounds is really relatively small and rejecting, inter alia, the contention that the *Lochner* Court's primary motive in establishing economic substantive due process was to advance the interests of businesses).

A. *Takings Clause Jurisprudence is Substantive Due Process Jurisprudence; Substantive Due Process is the Source of the Modern Takings Doctrine*

The first reason that the Due Process Clause should be used to protect unenumerated rights instead of the Takings Clause is a simple one: scholars and the Court itself have long recognized that the Court's regulatory takings doctrine is inextricably intertwined with its substantive due process jurisprudence.[118]

On the most elemental of levels, the takings doctrine as applied against the states *is* the creation of an unenumerated right, through the application of the Fifth Amendment to the states, a process quite similar to the incorporation of other parts of the Bill of Rights to the Fourteenth Amendment. The Fifth Amendment as written does not apply to the states; it merely guarantees that the *federal government* will not abridge the rights of citizens. The Takings Clause has been applied quite vigorously to actions taken by the states, although not always precisely in the name of substantive due process under the Fourteenth Amendment.[119] Although Federal, and not state, action was implicated in *Eastern Enterprises*, the vast majority of regulatory takings—indeed, the vast majority of "classic" takings—involve actions by state governments.

The argument to be made here is *not* a subtle one. The use of the Takings Clause in most cases requires that the Court use a doctrine of unenumerated rights, similar in nature to the doctrine of incorporation, to apply the Constitution's prohibition of eminent domain without just compensation to offending legislation, because most offending legislation is created by state fiat. As such, it seems backward, if not downright hypocritical, for the Court to pretend that it is avoiding substantive due process by applying the Takings Clause in regulatory contexts. Due process is, thus, a more honest road to the enforcement of unenumerated economic rights than the Takings Clause.

Admittedly, this argument is limited in its scope. The Court's use of the

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[118] The *Eastern Enterprises* plurality admits as much when it says that "[o]ur analysis of legislation under Takings and Due Process is correlated to some extent." *See* Eastern Enters. v. Apfel, 118 S. Ct. 2131, 2153 (1998).

[119] Although it does not seem to have been explicitly incorporated into the Fourteenth Amendment using substantive due process, there are many cases applying the Takings Clause to state actions. *See* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 119 S. Ct. 1624 (1999) (considering a claim that a city's failure to authorize various proposals to develop local land amounted to a taking under the Federal Constitution); *see also* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (striking down a New York cable television regulation under the federal Constitution); Mugler v. Kansas, 123 U.S. 623 (1887) (considering a Takings challenge to Kansas liquor law).

None of these decisions indicates explicitly that the Takings Clause has been incorporated against the states through the Fourteenth Amendment. The effect of these decisions, though, and of the Court's consistent use of the Takings Clause to evaluate state statutes and regulations, is much the same.

substantive due process doctrine to extend the enumerated rights of the first ten amendments to legislation passed by the states is a different, and potentially less extensive, endeavor than the "discovery" of unenumerated rights. But the principle remains: the Court's takings jurisprudence has its roots in substantive due process. As such, it would undoubtedly be better for the Court to utilize the substantive due process doctrine to sketch out the contours of its economic rights jurisprudence than to retain the Takings Clause as a kind of smoke screen for the clandestine enforcement of unenumerated rights.

Although the Court attempts in nearly every case involving economic rights to invoke the decision in *Pennsylvania Coal Co. v. Mahon*[120] as precedent,[121] there is wide division over what *Mahon* really means. Recent scholarship seems to indicate that *Mahon* may stand for something very different than the cause for which it is traditionally invoked.[122] Progressives in the era following Justice Holmes's departure from the Court were deeply skeptical about *Mahon*, considering it an aberration in the career of a man who otherwise functioned as the apotheosis of progressive conceptions of property ownership.[123] In fact, *Mahon* is often viewed as, at its core, a substantive due process decision.

In fact, many of the regulatory takings cases of the modern era are viewed as containing some element of substantive due process.[124] In particular, *Connolly v. Pension Benefit Guaranty Corp.*,[125] the case from which the *Eastern Enterprises* plurality draws its essential takings test, is deeply endowed with due process concerns. Similarly, Justice Stevens implies in *Lucas v. South Carolina Coastal Council* that these two areas of the law are closely intertwined.[126] This Comment would point out that the two are not just intertwined; they are nearly identical.

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[120] 260 U.S. 393 (1922).

[121] The plurality in *Eastern Enterprises* invokes *Mahon* more than once as the root source of its Takings jurisprudence. *See, e.g.*, *Eastern Enters.*, 118 S. Ct. at 2146.

[122] *See* James Audley McLaughlin, *Majoritarian Theft in the Regulatory State: What's a Takings Clause For?*, 19 WM. & MARY ENVTL. L. & POL'Y REV. 161 (1995); *see also* Richard A. Epstein, Pennsylvania Coal v. Mahon*: The Erratic Takings Jurisprudence of Justice Holmes*, 86 GEO. L.J. 875 (1998) (asking whether current Supreme Court Takings jurisprudence is justified by *Mahon*); Treanor, *supra* note 46, at 820–33.

[123] These conceptions were not entirely valid. Although Justice Holmes authored a prophetic dissent in *Lochner*, in which he railed against the majority for striking down the legislation in that case, it is clear, even in *Lochner*, that he agreed with the principle behind that decision: that the Court could enforce extra-textual rights where appropriate. Judge Bork, for one, has pointed out that Justice Holmes joined the majority in a variety of economic substantive due process decisions during his tenure on the Court. *See* BORK, *supra* note 15, at 47.

[124] Again, this is no surprise. The plurality admits as much when it states that the areas of substantive due process and regulatory takings are "correlated to some extent." *See Eastern Enters.*, 118 S. Ct. at 2153.

[125] 475 U.S. 211 (1986).

[126] *See* 505 U.S. 1003, 1072 n.7 (1992) (Stevens, J., dissenting).

This is perhaps indicated most strongly by the nature of the differing opinions in *Eastern Enterprises*. The plurality, the concurrence, and the dissent are remarkably close together on the issue of which test to use;[127] they are simply in disagreement about the doctrine under which this test should fall.

Finally, an argument posited by Justice Kennedy, almost *sode voce*, may illustrate why substantive due process is a superior vehicle when compared to the regulatory takings doctrine. He contends that although the majority appears to feel that its use of the Takings Clause does not require a normative judgment about the wisdom of the Coal Act, all actions which declare something unconstitutional involve normative judgments of one sort or another.[128]

There is some wisdom in his statement. The regulatory takings doctrine's essential test, as articulated in *Connolly*, seems to invite Justices to apply their own standards of economic fairness to the legislation in question. The test can be applied in ways that are essentially subjective and lack the guidance of even so loose a standard as the rational basis test used to evaluate due process claims.

B. *Balance*

Although the Court very recently indicated that it might seek to abandon the doctrine of substantive due process altogether, even in cases involving purely personal autonomy,[129] it has shown no willingness to truly do so.[130] The implications of a complete reversal of all substantive due process seem staggering.[131]

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[127] In fact, the most radically different solution may be that proposed by Justice Thomas, see *supra* note 81.

[128] *See Eastern Enters.*, 118 S. Ct. at 2157 (Kennedy, J., concurring in the judgment and dissenting in part). Justice Kennedy writes:

> If the plurality is adopting its novel and expansive concept of a taking in order to avoid making a normative judgment about the Coal Act, it fails in the attempt; for it must make the normative judgment in all events.... This sort of analysis is in uneasy tension with our basic understanding of the Takings Clause....

Id. (citations omitted).

[129] *See* Washington v. Glucksberg, 521 U.S. 702 (1997) (holding that terminally-ill individuals have no right to a physician-assisted suicide, while leaving open the possibility that there may be a right to allow oneself to die); *see also* Vacco v. Quill, 521 U.S. 793 (1997).

[130] At least, there has been no serious challenge to such long-standing substantive due process cases as *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Roe v. Wade*, 410 U.S. 113 (1973).

[131] The Court has, in fact, created so many "new rights" over the last thirty years, in cases like *Roe*, *Griswold*, and *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), that there is no telling what political and social upheavals might follow a reversal of all substantive due process "rights." They would likely make the uncertainty which followed the Court's disavowal of economic substantive due process in *Williamson v. Lee Optical*, 348 U.S. 483 (1955), look

But this presents a conundrum: although the Court seems willing and able to give substantive content to the word "liberty" in the Due Process Clause, it has been surprisingly stingy in imputing any meaning to the word "property." Clearly, the *Lochner* era, and the illegitimacy imputed to that phase of the Court's history, both within the academy[132] and by the Court itself,[133] have made the Court gun-shy in enforcing unenumerated economic rights through the Due Process Clause.

Yet some decisions from the *Lochner* era have never been abandoned. There are, in particular, several cases which address what we would call rights to personal autonomy that have remained good law, and have even been cited with approval by the Court in subsequent substantive due process decisions.[134] This, too, presents a fundamental question about the Court's rights jurisprudence: why are rights to personal autonomy[135] apparently more important than economic rights? Why are economic rights the "poor relations" of individual freedoms?[136]

There is no good reason. Behind the prejudice of the Court lies no sound policy—except, perhaps, for a desire to avoid charges of *Lochner*ing—or coherent plan of action for the enforcement of individual rights. It cannot be that rights to personal autonomy are more important than economic rights, although some may argue that it is so.[137] The intent of the Framers will not avail us here, either. The word "liberty" carries no more weight than the word "property" in the Due Process Clauses; there is no textual clue or other note, no evidence that the Framers intended that these rights should receive more protection than others.

If the Court continues to use the Due Process Clause to enforce unenumerated rights of personal autonomy—and it has, despite statements to the

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tame by comparison.

[132] *See* CHEMERINSKY, *supra* note 5, at 493–94; *see also* Michael J. Phillips, *The Progressiveness of the* Lochner *Court*, 75 DENV. L. REV. 453, 455–61 (1998) (describing the criticism levied at the *Lochner* Court).

[133] All sides of *Eastern Enterprises*, for instance, take great pains to point out that they are not *Lochner*ing. The plurality is somewhat subtle: "[T]his Court has expressed concerns about using the Due Process Clause to invalidate economic legislation." *Eastern Enters.*, 118 S. Ct. at 2153. Justice Kennedy is more explicit: "[T]he plurality is adopting its novel and expansive concept of a taking in order to avoid making a normative judgment about the Coal Act . . . ." *Id.* at 2157 (Kennedy, J., concurring in the judgment and dissenting in part). Finally, Justice Breyer names the problem: "Insofar as the plurality avoids reliance upon the Due Process Clause for fear of resurrecting *Lochner v. New York* and related doctrines of 'substantive due process,' that fear is misplaced." *Id.* at 2163 (Breyer, J., dissenting) (citations omitted).

[134] *See supra* note 130.

[135] Some examples include the right to privacy, the right to reproductive autonomy, and the right to live with one's extended family. *See supra* notes 22–23 and accompanying text.

[136] *See supra* note 50.

[137] Justice Stone's famous footnote in *United States v. Carolene Products*, 304 U.S. 144 (1938), is an example of one argument in this vein. *See supra* notes 37–38 and accompanying text.

contrary, shown no sign of really doing so[138]—then it is stunningly dishonest for the Court to avoid the issue[139] by enforcing economic rights through a doctrine that is clearly unsuitable for doing so.[140] The Court's fundamental rights jurisprudence is fatally unbalanced by its refusal to enforce unenumerated economic rights through the substantive due process doctrine. It should begin to craft a substantive due process jurisprudence that will enforce economic rights, under whatever test it deems appropriate.[141]

C. *Certainty*

Finally, the most surprising reason that the substantive due process doctrine may be a superior vehicle for the enumeration of unenumerated rights in our constitutional order is that it provides a measure of certainty that the regulatory takings doctrine cannot. This claim is surprising mostly because the foremost complaint against *Lochner* and its progeny is that they make it difficult for legislatures to know what economic regulations would withstand due process challenges; the substantive due process tests of that era, the creed goes, were arcane formulations that amounted to little more than the Justices' own subjective viewpoints on the legislation in question.[142]

Although the truth of this charge, in retrospect, is not at all clear,[143] it says nothing about the viability of today's substantive due process doctrine. Assuming that judicial restraint is a virtue to be cherished, it is important to note that, of the five Justices who wrote in *Eastern Enterprises* that they would invoke substantive

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[138] *See supra* notes 129–30.

[139] Some would contend that conservative members of the current Court are being dishonest in attempting to enforce *any* constitutional clause beyond the boundaries of its text. Justice Scalia, always a strict textualist in just about any given situation, seems to cut a slightly wider interpretational swath through opinions that deal specifically with economic interests than he does with cases that involve rights to personal autonomy. His dissent in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (Scalia, J., dissenting), is among the most vociferous denials of fundamental rights jurisprudence in the entire body of Supreme Court cases, and his concern is mostly textual in nature—he argues that the Court acts illegitimately when it seeks to read into the Constitution content that the text does explicitly support. Tellingly, though, in *Eastern Enterprises*, Justice Scalia joins the plurality opinion in stretching the boundaries of the Takings Clause. *See* 118 S. Ct. at 2131.

[140] *See* discussion *supra* Part IV.

[141] As Justice Kennedy's concurrence reveals, even the current, weakened version of substantive due process strikes down some economic legislation that is not rationally related to a legitimate government purpose. *See Eastern Enters.*, 118 S. Ct. at 2157 (Kennedy, J., concurring in the judgment and dissenting in part).

[142] *See* Phillips, *supra* note 132, at 459–60.

[143] *See* Phillips, *supra* note 117, at 1089–90 (suggesting that the *Lochner*-era Court rejected over 95 percent of the due process claims brought before it).

due process to evaluate economic regulation,[144] only one, Justice Kennedy, contended that it should invalidate the Coal Act. It is of note, too, that no regulation has been struck down on economic substantive due process grounds in almost seventy years.

The visceral hatred of *Lochner* and the knee-jerk reaction against economic substantive due process that it has inspired may well be the product of sixty years of hatred within the academy, as well as within the courts. As two of the opinions in the principal case point out, the shadow of *Lochner* lies long on the Court's economic rights jurisprudence.[145]

This gut-level aversion to *Lochner*ism is one of the chief reasons that the substantive due process doctrine might provide the area of economic rights with the restraint that will be required. The Court no longer does anything lightly in the name of substantive due process, if it ever did. It is unlikely to show more restraint with the regulatory takings doctrine—particularly if the plurality in *Eastern Enterprises* gains a vote—than it can with a doctrine it *knows* it must wield carefully.

VI. A WAY TO TURN THE WHEEL?

> *On the fourth day, to her great joy, Oz sent for her, and when she entered the Throne Room, he greeted her pleasantly.*
>
> *'Sit down, my dear. I think I have found a way to get out of this country.'*
>
> *'And back to Kansas?' she asked eagerly.*
>
> *'Well, I'm not sure about Kansas,' said Oz, 'for I haven't the faintest notion of which way it lies....'*
>
> – L. Frank Baum[146]

As these factors indicate, the regulatory takings doctrine falls far short of substantive due process as a vehicle for enforcing unenumerated economic rights. But proving that it is so is a hollow victory; the problem is knowing what to do with this victory after it has been achieved. The thought that the current Court might be destroying the integrity of one part of the Constitution in order to avoid charges of *Lochner*ing is a sobering one. And the thought that the use of substantive due process a la *Lochner* might be a superior doctrine of constitutional interpretation is an absolutely frightening one.

This conundrum begs the question: how is the judiciary to protect citizens (and their corporations) from substantive economic injustice? Clearly, there is a need, both socially and politically, to protect such rights, or the legal and

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[144] Justices Kennedy, Stevens, Ginsberg, Breyer, and Souter.

[145] The plurality opinion and Justice Breyer's opinion both make clear that the ghost of *Lochner* is one of the forces preventing the use of substantive due process. *See supra* note 133.

[146] L. FRANK BAUM, THE WIZARD OF OZ (Tor, 1993). Like the Wizard, I know how to get out of the place we're in, but I don't know in which way the correct solution lies.

constitutional literature would not be filled with essays purporting to contain canons of constitutional interpretation that allow them.[147]

But the Court's current understanding of the Due Process Clause is clearly unsatisfactory and unreliable. Justice Breyer articulates this understanding in *Eastern Enterprises*, when he writes for the dissenters that "there is no need to torture the Takings Clause to fit this case."[148] The "natural home" of Eastern's claim is, instead, the Due Process Clause, because the Coal Act, if it was invalid, was so because its retroactivity is "fundamentally unfair."[149]

This articulation of substantive due process is almost laughably unclear. Even as Justice Breyer asserts that he does *not* espouse a return to the substantive due process of the *Lochner* era,[150] he fails to describe the contours of a coherent standard by which it can be measured. I can almost hear a chorus of voices asking how Breyer's fundamental unfairness test differs from the subjective opinions of the individual Justices, or from the wide-ranging standard of the *Lochner* era.

And, of course, all of those voices are right. Such a loose standard invites a return to *Lochner*. Clearly, even if a return to the days of *Lochner* were possible, it would not be normatively desirable. The *Lochner* era was marked by more than a thirst on the part of the judiciary to protect unenumerated rights; its hallmark was an interpretational framework that depended on the discretion of individual Justices with specific economic views.

What is needed is a theory that will properly constrain the Court in its use of the Due Process Clause, the only provision of the Constitution which will properly hold the weight of unenumerated rights.[151] The search for such a theory

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147 *See supra* note 15.

148 *Eastern Enters.*, 118 S. Ct. at 2163 (Breyer, J., dissenting).

149 *Id.* at 2163–64. The test articulated by Justice Breyer to determine whether a law is fundamentally unfair in its application is essentially the same as that used by Justice Stevens. The question is this: is it fundamentally unfair to make Eastern pay for its past association with now-retired coal miners? In other words, as Breyer tersely states: "[W]hy Eastern?" *Id.* at 2164. Breyer explains, briefly, that the "fundamental fairness" test asks whether "the historical circumstances, taken together, prevent Eastern from showing that the Act's 'reachback' liability provision so frustrates Eastern's reasonable settled expectations as to impose an unconstitutional liability." *Id.* Justice Breyer then examines the historical circumstances surrounding the adoption of the NBCWA and concludes that, taken together, they indicate that Eastern could have expected, reasonably, that it would be required to provide lifetime medical benefits to the "orphaned" retirees in question, regardless of the explicit terms of the agreement that it signed. *See id.* at 2164–68.

Breyer attempts to head off criticism by writing that his use of the Due Process Clause to forbid retroactive application of the Coal Act is not designed to "resurrect . . . 'freedom of contract,'" but to "read the [Due Process] Clause in the light of [its] basic purpose." *Id.* at 2164. This purpose, presumably, is to provide a fundamentally fair result.

150 *See id.* at 2163–64.

151 Other theories have been suggested, but usually confine themselves to methods that the judiciary could use to derive unenumerated rights of personal autonomy or democratic participation. *See supra* note 15.

would consume whole tomes of academic criticism and is thus outside the essential scope of this Comment. But it is important, nonetheless. There is a deficiency in our Supreme Court's jurisprudence that must be addressed before unenumerated economic rights can be protected, without fatally fracturing some portion of the Constitution by according too great a degree of power to the judiciary.

Some scholars have suggested that the Court should evaluate economic rights under much the same rubric as the fundamental rights that are currently the exclusive subject of substantive due process.[152] Recent scholarship also suggests that the *Lochner* Court may not have wielded its power in so broad a manner as its accusers would have us believe.[153]

Others have suggested that the Equal Protection Clause should be used in conjunction with the Due Process Clause to secure economic liberties.[154] These scholars find an answer in the political process theories of scholars like John H. Ely and Michael Klarman.[155] They suggest, specifically, that the process-perfecting rights that underlie the Due Process and Equal Protection Clauses of the Constitution can provide a coherent answer to the question of which methods can best constrain the Court in the task of enumerating unenumerated rights[156] by insuring that the processes through which economic regulations are created and enforced are democratically enacted.

The final conclusion to which this enumeration of conflicting theories may bring us is the not-unreasonable idea that the Court should retreat from the enforcement of unenumerated economic rights altogether. Skeptical theorists[157] would undoubtedly take the opportunity provided by the plurality's tortured logic

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[152] *See, e.g.*, Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 GEO. L.J. 555 (1997) (arguing that the Court's current perception of its fundamental rights jurisprudence should be extended to cover various property interests).

[153] *See, e.g.*, Phillips, *supra* note 117; Phillips, *supra* note 132.

[154] *See* Levy, *supra* note 4, at 414–29.

[155] *See supra* note 15.

[156] *See, e.g.*, Levy, *supra* note 4, at 415. In addition, Levy suggests that "[t]o avoid the excesses of *Lochner*... the Court must also reject the categorical elements of current fundamental rights doctrine and engage in a more forthright evaluation of the relevant considerations underlying constitutional protection for *both* kinds of rights." *Id.* (emphasis added). Note that Levy appeals to the idea of balance, discussed *supra* Part IV.B.

Levy argues that the current method of applying fundamental rights jurisprudence should be abandoned and replaced with a "more nuanced analysis of all constitutionally protected interests." *Id.* at 418. He proposes a test that focuses on two factors: "(1) the extent to which government action burdens fundamental economic or other constitutionally protected interests; and (2) the extent to which particular actions are the result of political-process failures." *Id.* at 418–19.

[157] *See supra* note 15. Conservative theorists like Bork, Monaghan, and Waldron are often typified as "constitutional skeptics" because they are skeptical of the existence of extra-constitutional fundamental rights of any kind. *See* Foley, *supra* note 15, at 1600.

in *Eastern Enterprises* to point out that the doctrine of substantive due process was one of the most disastrous interpretational detours in the Court's history.[158] These skeptics might say that if the best that the Court can do to enforce unenumerated rights is to invoke a doctrine that clearly has less to do with unenumerated rights than the Due Process Clause, it may well have indicated the essential truth that our Constitution cannot hold unenumerated rights at all.[159] Perhaps, as the skeptics would contend, the ultimate meaning of *Eastern Enterprises* is that the Court should stop enforcing unenumerated rights altogether, for it either cannot or will not find a means to "discover" them that can be constrained by the Constitution as written.

VII. CONCLUSION

> *There are neither beginnings nor endings to the turning of the Wheel of Time. But it was a beginning.*
>
> —Robert Jordan[160]

Whatever solution is chosen, *Eastern Enterprises* imbues the decision with a sense of urgency. *Eastern Enterprises* indicates, if it is not held to its facts, that the Court lacks a compass in wielding the doctrine of regulatory takings. We have reached a point in our constitutional jurisprudence when economic rights are again becoming important. The wheel of time has spun 'round again, in a conjunction of social, political, economic, and philosophic currents that apparently require the Court to invoke some part of the Constitution as a means of striking down legislation that is fundamentally unfair in economic terms.

The Court's logic in *Eastern Enterprises* proves conclusively that the Takings Clause is not the most appropriate part of the Constitution to hold these rights. The Due Process Clause is a far more suitable vehicle, both practically and conceptually, with which to protect individuals from unfair economic legislation. The wheel has turned, and the course of our Supreme Court's jurisprudence should be allowed to turn with it.

The cyclical nature of the Supreme Court's jurisprudence is ultimately a trend to be embraced, not abhorred. It reflects the absolute truth that a society, over time, will have differing needs that must be addressed by its constitution.[161] Our

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[158] *See* BORK, *supra* note 15, at 44–46 ("To this day, when a judge simply makes up the Constitution he is said 'to Lochnerize,' usually by someone who does not like the result.... Both federal and state courts [of that period] were producing lots of *Lochners*.").

[159] *See supra* note 15.

[160] ROBERT JORDAN, THE PATH OF DAGGERS 45 (Tor, 1998).

[161] The history of other cultures seems to carry out the theory that a constitution whose contours are too rigid cannot survive for long. The Romans, for instance, had an unwritten constitution whose contours were spelled out by two forms of public law: the *ius civile* and the

own Constitution is notoriously difficult to amend;[162] the Court's recognition of changing circumstance may thus simply be a "safety valve" that allows social pressure to escape without destroying the foundation upon which our laws are built.

Such a valve is apparently needed, but the Court's decision to use the Takings Clause as a source of economic rights may well inflict irreparable harm on the written document. This method should be abandoned and replaced with a familiar, albeit unpopular one: the Due Process Clause, which can better hold the unenumerated economic rights envisioned by the Court in recent decisions without doing permanent damage to the written text.

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ius honorarium. The *ius civile* were the customary laws of Rome, which never changed, at least in theory; the *ius honorarium* were the modifications made in the law by various quasi-judicial officials, the *praetors* and the *aediles*, so that the law could adapt to the problems created by the introduction of non-Roman citizens into the Roman courts. *See* WOLFF, *supra* note 3, at 61–82.

[162] Bruce Ackerman suggested just such a theory when he developed the concept of "constitutional moments" in American history. These moments occur at times of great social and political upheaval and require that the Constitution, or at least the conception of it, be changed. Ackerman points to the re-definition of the Equal Protection Clause to strike down segregation of African-Americans during the 1960s as one example of a judicially-achieved "constitutional amendment" that would not, under our system's formal rules for amending the Constitution, have been achieved. *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991). This theory has not, in every case, been well received. *See, e.g.*, Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759 (1992).